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Nos. 61, 63

In the Supreme Court of the United States

OCTOBER TERM, 1945

OKLAHOMA PRESS PUBLISHING COMPANY,
PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

NEWS PRINTING COMPANY, INC., PETITIONER

v.

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

NO. 61

The findings of fact and conclusions of law of the District Court for the Eastern District of

Oklahoma (R. 53–56) are printed at 7 Wage Hour Rept. 665. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 63–71), affirming the judgment of the District Court, is reported at 147 F. 2d 658.

NO. 63

The opinion of the District Court for the District of New Jersey (R. 22–28) is reported at 49 F. Supp. 659. The majority and dissenting opinions of the Circuit Court of Appeals for the Third Circuit (R. 89–98), reversing the judgment of the District Court, are reported at 148 F. 2d 57.

JURISDICTION

The judgment of the Circuit Court of Appeals in No. 61 was entered on February 15, 1945 (R. 71). The petition for a writ of certiorari was filed on April 16, 1945, and granted on May 21, 1945. The judgment of the Circuit Court of Appeals in No. 63 was entered on March 5, 1945 (R. 98). The petition for a writ of certiorari was filed on April 19, 1945, and granted on May 21, 1945. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

1. Whether trial and adjudication of the applicability of the provisions of the Fair Labor Standards Act to an employer is a prerequisite to enforcement of an administrative subpoena duces

tecum issued in the course of an investigation under Section 11 (a) of that Act.

2. Whether in a proceeding to enforce such a subpoena against a member of an industry which is generally within the scope of the Act, the Administrator must show "probable cause" to believe that the employees of the particular member are covered by the Act.

3. Whether enforcement of the administrative subpoenas issued in the course of investigations to ascertain whether petitioners have violated any provisions of the Act infringes the Fourth Amendment.

4. Whether the application of the Act to newspaper publishers abridges the guaranties of the First Amendment.

STATUTES INVOLVED

The statutory provisions involved are Sections 9, 11 (a), and 13 (a) (8) of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201–219, and Section 9 of the Federal Trade Commission Act, 38 Stat. 717, 15 U. S. C. 49. These provisions are set forth in the Appendix.

STATEMENT

NO. 61

Upon the refusal of petitioner to permit any inspection of its records by the Wage and Hour Division, a subpoena duces tecum signed by the

Administrator was duly served on the business manager of petitioner's two newspapers on November 3, 1943, requiring petitioner to appear before a designated representative of the Division at a specified place in Muskogee, Oklahoma, on November 17, 1943, to produce certain specified records and papers in a matter "involving an investigation pursuant to the provisions of Sections 9 and 11 (c) [(a)] of the Fair Labor Standards Act of 1938 regarding complaints of violations by said company * * * " (R. 9–12, Exs. B and C). The records called for were petitioner's wage and hour records for employees of its two daily newspapers during a specified period and the "books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods". (R. 11).

Petitioner refused to comply with the subpoena on the ground that the Act was inapplicable to its business (R. 12–14). The Administrator thereupon applied to the District Court for an order directing compliance with the subpoena. The application (R. 5–9) alleged, on information and belief, that petitioner publishes two daily newspapers and is engaged in the production of goods for interstate commerce and in commerce

within the meaning of the Act, and that all the books, papers and documents referred to in the subpoena are relevant and material "to determine whether the company has violated [the Act] * * * and will aid in the enforcement of the provisions of the Act" (R. 8).

In response to an order to show cause why the subpoena should not be enforced (R. 14–15), petitioner admitted that it publishes two daily newspapers, that it receives out-of-State news and advertisements which it prints in its newspapers, and that 137 papers are sent daily without charge to members of the armed forces serving in other States and overseas and 67 daily to out-of-State advertisers (R. 19, 54–55, Dft. Exs. C, D, E, F, R. 41–49). Petitioner challenged the jurisdiction of the court and contended, in the words of the District Court (R. 53–54), "that the Act is not applicable to newspapers, and if so, it is unconstitutional; that the Company is not engaged in commerce or in the production of goods for commerce."

The District Court granted the Administrator's application and issued an order requiring the production of the records specified in the subpoena (R. 56–57). On the authority of *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445 (C. C. A. 6), certiorari denied 322 U. S. 728, the court ruled that petitioner's business was subject to the Act. It concluded that it had jurisdiction of the proceed-

ings "under the provisions of the Act, and under the facts admitted herein" and that no reason had been shown for withholding a compliance order (R. 55–56).

The Circuit Court of Appeals affirmed (R. 63–71). It held that petitioner "is not entitled to an adjudication of actual coverage as a prerequisite to the enforcement of the subpoena" (R. 69). The court stated that the Administrator must show "probable cause" or "that reasonable grounds exist for making the investigation" (*ibid*), but that "to hold that the Administrator cannot compel the production of data relating to coverage until that question has been conclusively determined, is to deny him the very powers deemed necessary in order to effectuate the purposes of the Act" (R. 70). The application and affidavits in the instant case were held to furnish a sufficient showing of "reasonable grounds for the belief that appellant [petitioner] or any of its employees were subject to the Act" (R. 70). Petitioner's further contention that the enforcement of the subpoena would violate the First Amendment was rejected on the grounds that newspaper publishers are not immune from the application of general laws and that the regulations "imposed upon those covered by the Fair Labor Standards Act are not an abridgment of the freedom of the press" (R. 71).

NO. 63

This was a proceeding instituted by the Administrator to enforce a subpoena substantially the same as that involved in *Oklahoma Press Publishing Company* v. *Walling,* No. 61. He alleged that he had "reasonable grounds for believing that . . . [petitioner] was violating" stated provisions of the Act (R. 4). In its response to the order to show cause, which was similar to that in No. 61, petitioner raised various constitutional objections, denied that it was subject to the Act, and denied that the District Court had jurisdiction. Petitioner alleged that its net paid daily circulation was 27,470 and that an average of only 278 of its newspapers were distributed daily outside the State of New Jersey. (R. 11–21.)

The District Court denied the Administrator's application on the ground that he was not entitled to enforcement of the subpoena without establishing in the enforcement proceeding that the employer is subject to the Act (R. 22–28). It held, however, that there was no merit in petitioner's contention that the application of the Act to newspapers constitutes an abridgment of freedom of the press or violates the Fifth Amendment (R. 27).

The Circuit Court of Appeals, one judge dissenting, reversed the judgment denying the application (R. 89–98). It held that the Administra-

tor's application was sufficient to entitle him to judicial enforcement of the subpoena (R. 94), pointing out that "to require the Administrator to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation" (R. 95). Petitioner's constitutional objections were rejected (R. 96).

Judge McLaughlin dissented on the ground that there was not a sufficient showing of "probable cause" or "reasonable ground for believing that petitioner's business is subject to the Act" to warrant judicial enforcement of the subpoena (R. 96–98).

SUMMARY OF ARGUMENT

I

Section 11 (a) of the Fair Labor Standards Act authorizes the Administrator to make investigations and to issue subpoenas in connection therewith "to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of the Act." Hence it is necessary for the Administrator to investigate facts showing whether a particular employer is subject to its provisions as well as whether he has failed to make the wage and hour payments required by the Act. It would be anomalous and impracticable to require proof of the fact of coverage in advance of inspection,

and the Act makes no such requirement. The decisions below holding that the district courts should not try and adjudicate the question of coverage before enforcing a subpoena are in harmony with the statute, with the overwhelming majority of decisions of the lower courts, and with applicable principles laid down by this Court.

The Act entrusts to the Administrator the duty of determining by investigation whether violations have occured before seeking the aid of the courts in enforcement proceedings. In such enforcement proceedings petitioners would be free to raise all questions going to the merits including the defense that they were not subject to the provisions of the Act. Nothing in the language or scheme of the Act suggests that a judicial determination of coverage is a prerequisite to the investigation; it was plainly intended that the investigation be a means of ascertaining whether the Act applies and whether underpayments have been made, before judicial enforcement proceedings are instituted.

Considerations which caused this Court in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, to decide that the district court should not try the issue of coverage in a proceeding to enforce an administrative subpoena under the Public Contracts Act apply to the enforcement of subpoenas under the Fair Labor Standards Act.

Under both statutes the duty to make investigations is entrusted to the administrative agency which must investigate coverage as well as the wages and hours of employees. To sever the issues for separate court hearing and decision would be of the same "doubtful practicality" under the Fair Labor Standards Act as under the Public Contracts Act.

It is not our contention that the function of the district courts in enforcing a subpoena under Section 9 of the Act is ministerial or that "appropriate defense" may not be made to an application for enforcement. The application may properly be resisted if the subpoena is vague or unreasonably burdensome or if the evidence sought is not germane to any lawful subject of inquiry. There is ample scope in the auxiliary judicial proceeding for protection against arbitrary use of the subpoena power, but no authority to require the trial and adjudication of the question whether the employer addressed in a subpoena is subject to the Act as a prerequisite to enforcement of the subpoena.

II

Although there was ample showing of "probable cause" with respect to coverage before the District Courts in the cases at bar, no showing of probable cause is necessary to secure the enforcement of a subpoena if the evidence called for is not plainly irrelevant to any lawful inquiry under

the Act. The same considerations that make it unnecessary to prove coverage in these auxiliary proceedings make it improper to require the Administrator to establish probable cause with respect to coverage before he may have the aid of the courts in his investigations. The purpose of investigation by the Administrator being to ascertain whether violations have occurred, he should not be called upon as a condition to making such an investigation to present evidence forecasting a probable favorable result.

The showing of probable cause is not necessary to avoid judicial sanction for unwarranted or arbitrary action. The same tests applicable to the enforcement of grand jury subpoenas, pretrial examinations, and other auxiliary court proceedings should be applied, and if the evidence called for is not palpably irrelevant to any lawful inquiry or the subpoena is not issued in bad faith, no further showing should be required. Unless it appears from the pleadings and facts concerning the industry which are of common knowledge that employees within it could not be covered by the terms of the statute, investigation to ascertain whether violations have occured is not arbitrary or unwarranted. In cases where coverage is doubtful, an investigation may be especially necessary to resolve the doubt.

The present cases, however, are not doubtful ones. The contention that trade in news among the States is not interstate commerce has been

definitely rejected by this Court. Nor is there any question that Congress intended the Fair Labor Standards Act to apply to newspapers. The very facts set forth in petitioners' papers filed in opposition to these applications show that their activities are subject to the terms of the Act.

III

The subpoenas here involved comply fully with the requirements of the Fourth Amendment. They have no oppressive features. Their demands are specific, limited in time, and call for records clearly relevant to the inquiry authorized by the statute. They have none of the evils of writs of assistance at which the Fourth Amendment was aimed.

There is no requirement in the statute or otherwise that there be formal complaints of violations either by or to the Administrator before an investigation may be undertaken. This Act unlike the Public Contracts Act does not provide for the issuance of a formal complaint by the Administrator prior to his inquiry. Neither did Congress provide that the Administrator must first be prodded by the complaint of an outsider before undertaking to ascertain whether violations of the Act have occurred.

IV

The application of the wage and hour standards of the Act to petitioners' newspaper employees

does not violate the constitutional guaranty of a free press. Newspapers are not exempt from the application of general laws and the First Amendment does not afford them immunity from observing minimum labor standards. The Fair Labor Standards Act does not impose any censorship or otherwise "trespass upon the domains set apart" for a free press.

The exemption of certain classes of weekly newspapers by Section 13 (a) (8) of the Act does not constitute an invalid classification. The Fifth Amendment does not require the full and uniform exercise of the commerce power, and Congress may weigh relative needs and limit the application of legislative measures.

ARGUMENT

I

TRIAL AND ADJUDICATION OF THE QUESTION WHETHER PETITIONERS WERE COVERED BY THE ACT WAS NOT PREREQUISITE TO ENFORCEMENT OF THE SUBPOENAS

Section 11 (a) of the Fair Labor Standards Act authorizes the Administrator to conduct investigations. Section 9 of the Act authorizes him for the purpose of such investigations to issue subpoenas which the district courts are empowered to enforce. Section 11 (a) authorizes two distinct types of investigatory proceedings: (1) investigations to "gather data regarding the wages, hours, and other conditions and practices of employment

in any industry subject to this Act * * *," without reference to enforcement, and (2) investigations for the purpose of law enforcement.

These cases involve the second type of investigations. With respect to these, the Administrator is authorized to

> enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate *to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act.*[1] [Italics supplied.]

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[1] The distinction between the two types of investigations which the Administrator is thus authorized to conduct is clearly set out in *In re Standard Dredging Corp.*, 44 F. Supp. 601 (S. D. N. Y.), affirmed, 132 F. 2d 322 (C. C. A. 2), certiorari denied, 319 U. S. 761, where the court said: "A logical line divides the two powers of investigation. The first power is apparently intended largely for statistical and informational purposes. Its object is knowledge, like that of much of the data gathered under the census, not law enforcement. * * * The second power is designed to facilitate the enforcement of a law which necessarily requires on [the] part of the government an intimate acquaintance with working conditions, wages and hours of employment in individual establishments. The power granted is as broad as the need. 'To determine whether any person has violated any provision of this Act' it is no more requisite to know what wages he pays and what hours he keeps than to know whether he is engaged in commerce" (p. 602).

An administrative determination "whether any person has violated any provision of this Act" is contemplated by Section 11 (a) and must necessarily be made before suit by the Administrator for an injunction against violations, such as is authorized by Section 17. This determination—and therefore the investigation preceding it—must relate to coverage as well as to underpayment[2] since both of these elements are equally necessary to a violation. The Administrator cannot be expected to know in advance of the investigation whether a particular employer has violated the Act or the extent to which, if at all, he is subject to the Act. Since one of the purposes of the investigation is to determine whether the business of the employer is covered by the Act, it would be anomalous and impracticable to require proof of this fact in advance of inspection, just as it would be to require advance proof of underpayments. It is our position that the Act does not require such proof.

It is not our contention that the function of the district courts in enforcing subpoenas under Section 9 of the Act is ministerial or that "the court ipso facto must grant his [the Administrator's]

[2] "Coverage" is used in this brief to mean the applicability of the provisions of the Fair Labor Standards Act to a group of employees, rendering their employer subject to the Act, and "underpayment" to mean failure to observe the minimum wage or overtime compensation requirements of the Act.

application for enforcement" (Pet. No. 61, br. 12). The statement that this is the Government's contention results from a misapprehension both of our position and of the decisions of the circuit courts of appeals in these cases. To an application for enforcement of a subpoena "appropriate defense" may of course be made. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49. The application may properly be resisted on the ground that the subpoena is unduly vague or unreasonably burdensome, *Hale* v. *Henkel*, 201 U. S. 43; or that the hearing is not of the kind authorized, *Harriman* v. *Interstate Commerce Comm.*, 211 U. S. 407; or that the subpoena was not issued by the person solely vested with that power. *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357.[3] To these may be added the ground that on the pleadings it is plain that the evidence sought is not germane to any lawful subject of inquiry—as would be the case in these proceedings if, for example, a demand had been made for a list of the petitioners' stockholders or the dividends paid to them. In short under any view there is ample scope in the auxiliary judicial proceeding for pro-

[3] No question of the privilege against self-incrimination arises since Section 9 of the Federal Trade Commission Act (*infra*, pp. 47–48), which is made applicable to investigations under the Fair Labor Standards Act by Section 9 of that Act (*infra*, p. 46), provides immunity from criminal prosecution for persons testifying or producing documentary evidence in obedience to administrative subpoenas.

tection against arbitrary use of the subpoena power.

It is also clear that even if the petitioners' contentions were to prevail, they would not be protected from disclosure of the contents of the records called for by the subpoena until there had first been a judicial determination of coverage. For if, as petitioners urge, the district courts upon application to enforce the administrative subpoena are to try the question whether petitioners' employees are covered by provisions of the Act, the Administrator would, in those proceedings, be entitled to have the very same records produced as evidence pursuant to subpoenas issued by the courts. By appropriate discovery proceedings, the Administrator could also secure the production of these records before trial of the issue of coverage in any proceeding which he might bring either to enforce the subpoena or to enjoin violations. See *Bethlehem Shipbuilding Corp., Ltd.* v. *National Labor Relations Board,* 120 F. 2d 126 (C. C. A. 1).

The actual issue which emerges is a narrow one. It is whether an application for enforcement of a subpoena for employment records and records of the interstate activities of petitioners, the coverage of whose employees by the Act is one of the matters under investigation, shall be made the occasion for the courts to adjudicate that question

in an auxiliary and essentially interlocutory proceeding. The decisions below holding such adjudications to be improper are in harmony with the statute, with accepted principles laid down by this Court, and with the overwhelming majority of decisions of the lower courts.

Petitioners are not in these proceedings being accused of violating the Act. The questions of coverage which they seek to raise are matters that should not be tried and determined unless and until action is instituted by the Administrator to enforce the substantive provisions of the Act against them. Without evidence it cannot definitely be known whether or to what extent the Act applies or whether petitioners have complied with its provisions. The whole purpose of the investigations authorized by Section 11 (a) is to enable the Administrator to determine those questions in deciding whether or not to institute an action to enforce the provisions of the Act. This is his function and it is premature to ask a court in an auxiliary proceeding, brought to compel obedience to a subpoena, to decide questions which may never be at issue in an enforcement action.

Enforcement of the Act would be seriously impeded if in order to inspect an employer's records the Administrator had first to litigate all questions going to the merits which a respondent might choose to raise. Nothing in the language or scheme of the Act suggests that a judicial determination of coverage is a prerequisite to the

investigation; it is plainly intended, rather, that the investigation be a means of ascertaining whether the Act applies and whether underpayments have been made before judicial enforcement proceedings are instituted. To dispense with the preliminary investigation of coverage would compel the Administrator to institute enforcement proceedings on suspicion or unverified reports, a practice which would certainly be of "dubious propriety". *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 508. To impose on the other hand the burden of proving coverage in order to carry forward the investigation would be to deprive the Administrator of the aid to enforcement which the investigatory provisions of the statute were designed to afford.

With one possible exception, all the circuit courts of appeals which have passed upon the question have held that the Administrator is not required to prove coverage in order to obtain court aid in the enforcement of subpoenas. *Martin Typewriter Co.* v. *Walling,* 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.,* 132 F. 2d 322 (C. C. A. 2), certiorari denied, 319 U. S. 761; *Walling* v. *American Rolbal Corp.,* 135 F. 2d 1003 (C. C. A. 2); *Walling* v. *News Printing Co.,* 148 F. 2d 57 (C. C. A. 3), No. 63 herein; *Cudahy Packing Co. of La.* v. *Fleming,* 119 F. 2d 209 (C. C. A. 5), reversed on other grounds, 315 U. S. 785; *Mississippi Road Supply Co.* v. *Walling,* 136 F. 2d 391 (C. C. A. 5), certiorari denied, 320 U. S.

752; *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690; *Walling* v. *Benson*, 137 F. 2d 501 (C. C. A. 8), certiorari denied, 320 U. S. 791; *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (C. C. A. 8), reversed on other grounds, 315 U. S. 785; *Oklahoma Press Pub. Co.* v. *Walling*, 147 F. 2d 658 (C. C. A. 10), No. 61 herein. The Circuit Court of Appeals for the Fourth Circuit has not passed on this question, but the district courts of that circuit are in accord. *Walling* v. *Daily Press*, 58 F. Supp. 792 (E. D. Va.); *Walling* v. *Evening Post Publ. Co.*, 8 Wage Hour Rept. 431 (E. D. S. C.). In the Ninth Circuit, the district court decision in *Fleming* v. *Bank of America National Trust & Savings Assn.*, 5 Wage Hour Rept. 242 (N. D. Calif.), is *contra*, but *Walling* v. *Detweiler Bros.*, 58 F. Supp. 201 (D. Idaho), is in accord with the majority view. In the Sixth Circuit, *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596, decided prior to the *Endicott Johnson* case, *supra*, held that coverage must be proved before enforcement of the Administrator's subpoena will be ordered, but this holding has since been modified in *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198 (C. C. A. 6).

Considerations which caused this Court in *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, to decide that the District Court should not try the issue of coverage in a proceeding to enforce an

administrative subpoena under the Public Contracts Act apply to the enforcement of subpoenas under the Fair Labor Standards Act.[4] Although the Public Contracts Act and the Fair Labor Standards Act occupy different areas and provide somewhat different procedures,[5] their provisions

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[4] That case has been held controlling in proceedings to enforce subpoenas of the Administrator of the Wage and Hour Division by the First and Second Circuits and was regarded as at least persuasive by the Fifth Circuit. *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (C. C. A. 2); *Mississippi Road Supply Co.* v. *Walling*, 136 F. 2d 391 (C. C. A. 5), certiorari denied, 320 U. S. 752. The Circuit Court of Appeals for the Sixth Circuit has held it to be not controlling, although it reached the same result as if it were. *Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198 (C. C. A. 6); and cf. *Walling* v. *Benson*, 137 F. 2d 101 (C. C. A. 8).

Although the opinion in the *Endicott-Johnson* case does not discuss the applicability of the decision to subpoena enforcement proceedings under the Fair Labor Standards Act, this Court stated (317 U. S. at p. 502) that certiorari had been granted in part "because of probable conflict" of the decision of the Circuit Court of Appeals for the Second Circuit which it affirmed and the holding of the Sixth Circuit in *General Tobacco & Grocery Co.* v. *Fleming*, 125 F. 2d 596, which required proof of coverage before a Wage-Hour subpoena would be enforced.

[5] In the *Endicott Johnson* case this Court cited the formal proceedings before the Secretary, leading to decisions with regard to violations of the Public Contracts Act, and the conclusiveness of the Secretary's determinations of fact, including the fact of coverage, as among the reasons why the district courts should not undertake to decide coverage in interlocutory proceedings for the enforcement of subpoenas. Although the particular reasons for deference to the administrative authority are not present under the Fair Standards

are similar with respect to investigations. The Secretary of Labor under the former statute and the Administrator of the Wage and Hour Division under the latter are authorized to conduct investigations to ascertain whether or not violations of the law have occurred. In such inquiries the Administrator, like the Secretary of Labor under the Public Contracts Act, must investigate coverage as well as possible underpayments, both elements being "indispensable" to violations under both statutes. Under both Acts the investigation is entrusted to the administrative agency and not to the courts, whose function at that stage is to aid investigations by enforcing subpoenas properly issued.

The difference between the two statutory schemes is that the Secretary of Labor under the Public Contracts Act, following his investigation, makes a formal determination of coverage and imposes sanctions in the administrative proceed-

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Act, the more significant considerations underlying the *Endicott Johnson* decision, to which we refer, are present and point to the same conclusion under both Acts.

We do not understand the statement in the Court's opinion in that case that the Public Contracts Act is not "an Act of general applicability" but one which applies only to those who contract with the Government and who thereby are "fairly forewarned" of the terms (317 U. S. at p. 507), to mean that an employer by so contracting has waived any right to a prior determination of coverage in the proceedings to enforce a subpoena which he would otherwise have had by virtue of constitutional requirements.

ing, subject to customary court review[6] (41 U. S. C. 36–39), whereas the Administrator of the Wage and Hour Division as a result of his investigation determines only whether to institute court action seeking the imposition of sanctions. This is a difference in the scope of the ultimate administrative function; but under both acts the purpose of the subpoena is to aid the investigation entrusted to the administrative authority. Accordingly, the same considerations which make it improper for a district court to undertake the determination of coverage when called upon to enforce a subpoena issued in the course of an investigation pursuant to Section 5 of the Public Contracts Act make it equally improper in a similar proceeding under the Fair Labor Standards Act for a court to undertake the determination of coverage which the Administrator should make.

The need for investigating the question of coverage and the impracticability of severing the issue of coverage for "separate hearing and decision" are the same under both acts. The Administrator like the Secretary is unfamiliar with the

[6] The action of the Secretary under Section 3 of the Public Contracts Act in placing a violator on an ineligible list for three years has been held to be not judicially reviewable on the authority of *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113. *Lane Cotton Mills* v. *Perkins*, U. S. District Court for the District of Columbia, Civil Action No. 8433, decided October 15, 1940.

operation of individual plants prior to inspection, and any procedure which would require him to decide the issue of coverage without benefit of an investigation would, as in the case of the Public Contracts Act, be of "dubious propriety". To sever the issues for separate court hearing and decision would, as under that Act, be "of doubtful practicality". *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. at p. 508.

Indeed, as a practical matter the enforcement of a subpoena without prior judicial determination of coverage would appear to be less objectionable under the Fair Labor Standards Act than under the Public Contracts Act. The Administrator's investigations cannot result in sanctions until after the institution of suits for injunction or criminal actions in which all questions, including that of "coverage", are tried *de novo,* unaffected by any prior administrative determination. *Kirschbaum Co.* v. *Walling,* 316 U. S. 517, 523. The Secretary of Labor under the Public Contracts Act, on the other hand, is authorized to reach a final determination as to both coverage and compliance and can himself impose sanctions. Courts called upon to enforce the penalties which the Secretary imposes are concluded by his findings "if supported by the preponderance of the evidence" (41 U. S. C. 39). The opportunity of the employer to challenge the administrative conclusions which a court would anticipate by inter-

ference at the subpoena stage is, accordingly, much more limited under that Act than under the Fair Labor Standards Act.

We submit, therefore, that it was proper for the courts below to enforce the administrative subpoenas without prior trial of petitioners' claims that their respective businesses were not subject to the Act.

II

ALTHOUGH THERE WAS AMPLE SHOWING OF "PROBABLE CAUSE" BEFORE THE DISTRICT COURTS IN THE CASES AT BAR, NO SHOWING OF "PROBABLE CAUSE" IS NECESSARY IF THE EVIDENCE CALLED FOR IS NOT PLAINLY IRRELEVANT TO ANY LAWFUL INQUIRY UNDER THE ACT

The same considerations that render it unnecessary to prove coverage in these proceedings to enforce subpoenas make it improper to require the Administrator to establish "probable cause" to believe that petitioners are subject to the Act before he may have the aid of the courts in his investigation. Under Section 11 (a) it is the duty of the Administrator to investigate "whether any person has violated any provision" of the Act, and Section 9 authorizes him to invoke the assistance of the courts against those who prevent him from pursuing his investigations. There is no more reason why the Administrator should possess or produce evidence of coverage rising to the level of "probable cause" before being per-

mitted to proceed with an investigation than there is to require him to present full proof of coverage. The issue in these proceedings is not how probable it is that an employer may be subject to the Act or may have departed from its provisions but whether the investigation to ascertain whether there have been violations may proceed unimpeded by the employer's refusal to disclose information necessary for that purpose. The Administrator's function in ascertaining whether violations have occurred is not unlike that of a grand jury investigating to determine whether crimes have been committed. No prior showing of probable cause to believe that a crime has been committed need be made to justify a grand jury subpoena, *Blair* v. *United States*, 250 U. S. 273, 282–283; *Hale* v. *Henkel*, 201 U. S. 43, and nothing in the language or purpose of the Fair Labor Standards Act imposes any greater limitation upon the investigatory powers of the Administrator.

The decision of the court below in No. 63 did not require the Administrator to show probable cause with respect to coverage, and the Circuit Courts of Appeals for the First and Second Circuits are in agreement. *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. C. A. 1); *Walling* v. *Standard Dredging Corp.*, 132 F. 2d 322 (C. C. A. 2). See also *Mississippi Road Supply Co.* v. *Walling*, 136 F. 2d 391 (C. C. A. 5); *Walling*

v. *Detweiler Bros.*, 58 F. Supp. 201 (D. Idaho); *National Labor Relations Board* v. *Northern Trust Co.*, 148 F. 2d 24 (C. C. A. 7), certiorari denied October 8, 1945, Nos. 189–190, this Term; *Walling* v. *Daily Press*, 58 F. Supp. 792 (E. D. Va.). The Circuit Court of Appeals for the Tenth Circuit in No. 61 stated that the Administrator must show "probable cause"[7] to believe that the petitioner's activities are covered by the Act, as did Judge McLaughlin, dissenting in No. 63. The Circuit Court of Appeals for the Eighth Circuit (*Walling* v. *Benson*, 137 F. 2d 501) and for the Sixth Circuit (*Walling* v. *LaBelle Steamship Co.*, 148 F. 2d 198) apply the same rule.

It is submitted that the holdings of the courts first cited are correct. The Act does not contemplate that the Administrator must refrain from investigating to ascertain "whether any person has violated any provisions of the Act" when he does not in advance of his investigation possess and produce facts which it is the very purpose of the investigation to disclose. The holding of the court below in No. 61 that the Administrator must satisfy the District Court in the enforcement proceedings that there were "reasonable grounds for the belief that appellant [petitioner] or any of its employees were subject to the Act" (R. 70) rests not on any provision in the Act but upon

[7] The court held that probable cause had been shown in the instant case.

concern lest judicial sanction be given to unwarranted and arbitrary action (R. 69). The showing of probable coverage, however, is not essential to avoid arbitrary action in the investigatory proceeding. It is of course true that judicial responsibility in such auxiliary court proceedings requires assurance that no fundamental rights are being invaded by the subpoena, but this does not mean that the inquiry must be "limited * * * by * * * forecasts of the probable result of the investigation * * *," *Blair* v. *United States*, 250 U. S. 273, 282. We have already pointed out that when the court's aid is invoked under Section 9 appropriate defenses may be interposed, for example, to resist a subpoena which is unreasonably vague or unduly burdensome. So, too, it is not denied that the court must be free to refuse to enforce a subpoena which calls for evidence palpably irrelevant or one plainly issued in bad faith. This is the test consistently applied[8] in cases where an auxiliary court is asked to lend its aid to compel testimony or to procure evidence

[8] Similar criteria govern examinations, depositions and subpoenas before trial under the Federal Rules of Civil Procedure. See Rules 26 (b), 30 (d) and 45. For representative decisions under these Rules, see: *Union Central Life Ins. Co.* v. *Burger*, 27 F. Supp. 556 (S. D. N. Y.); *Bloomer* v. *Sirian Lamp Co.*, 8 F. R. S. 26b.31, Case 3 (D. Del.). Questions as to the ultimate admissibility upon the trial of the evidence sought are not permitted to "frustrate the attempt to obtain the desired information" in the pre-trial proceedings (*Lewis* v. *United Air Lines Transport Corp.*, 27 F. Supp. 946, 947 (D. Conn.)).

for use in connection with a grand jury investigation, *Blair* v. *United States,* 250 U. S. 273, 282–283; *Essgee Co.* v. *United States,* 262 U. S. 151, 157, or in aid of a hearing in another court, *Dowagiac Mfg. Co.* v. *Lochren,* 143 Fed. 211, 215 (C. C. A. 8), or in discovery proceedings in aid of an action at law, *Sinclair Refining Co.* v. *Jenkins Co.,* 289 U. S. 689.[9] The opinion of this Court in the *Endicott Johnson* case suggests that in proceedings to enforce administrative subpoenas the same test is applicable, i. e., whether "the evidence sought by the subpoena . . . [is] plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act * * *" 317 U. S. at 509.[10]

The Fourth Amendment (Pet. br. No. 61, p. 23) does not require that all searches be preceded by proof of probable cause. By its language a show-

[9] Although Mr. Justice Cardozo, in the opinion of the Court, speaks of "good faith and probable cause", these requirements are said to be imposed to protect the litigant in the action at law from "impertinent intrusion" of his records by "a competitor posing as a suitor", 289 U. S. at pp. 696–697. This does not suggest that discovery will be denied unless the plaintiff shows probability of success in the main action.

[10] Since the opinion below in No. 61 does not indicate what would be an adequate showing of "probable cause", it may be that the rule enunciated is no different from the test we here contend for. On the other hand the court may mean that the Administrator must, before he may obtain the aid of a court in investigating an employer, present evidence gathered from other sources forecasting a probable favorable result of the investigation. It is the latter requirement which we contend is improper.

ing of "probable cause" is required only with respect to search warrants. The misuse of warrants was the evil at which the Amendment was primarily directed. In fact, there is evidence in the constitutional history of the Fourth Amendment that general warrants were the sole abuse sought to be prevented. See N. B. Lasson, *The History and Development of the Fourth Amendment* (1937), pp. 81, 100–103. In any event, the constitutional limitation upon other types of searches is that they be not unreasonable, and a showing of probable cause is not a necessary element of permissible searches, as the cases dealing with grand jury subpoenas show. Moreover, legislatures are well aware that probable cause is a prerequisite to the issuance of valid search warrants (see, e. g., the provisions of the Criminal Code relating to search warrants, 18 U. S. C., 611–633) and it is reasonable to assume that if Congress had intended a similar showing to be made by the Administrator before he could secure the aid of a court in enforcing a subpoena, it would have expressly so provided in Section 9 of the Act.

When called upon to aid in enforcing a subpoena the district courts should accordingly accept the Administrator's allegation that he has reasonable grounds for making the investigation unless the evidence called for is palpably irrelevant to any lawful inquiry. Like other public officers, the Administrator is entitled to the presumption of regularity in the performance of

his official duties, *United States* v. *Chemical Foundation,* 272 U. S. 1, 14; *Klamath Indians* v. *United States,* 296 U. S. 244, 253, and unless it appears from the pleadings and from facts concerning the industry which are common knowledge that employees within it could not be covered by the terms of the statute, an investigation to ascertain whether violations have occurred is not arbitrary or unwarranted. In the ordinary case in which an investigation is likely to be undertaken the Administrator cannot determine in advance, and neither can the courts, whether the inquiry will disclose facts which are irrelevant to any purpose authorized by the Act. For the courts to ascertain whether there is probable cause they would themselves ordinarily have to subpoena the employer's records in advance of reaching a determination. It would be unreasonable to require that the Administrator make his determination, required by the statute, without a similar opportunity to examine the primary sources of information. It is precisely for this purpose that the Act affords him the right to investigate and the power to issue subpoenas.

If the Administrator were to subpoena the records of a business of a kind plainly outside of the scope of the Act, such as that of the corner grocery store or the ordinary farmer, the court would of course not be bound to accept the allegation that there were reasonable grounds for an investi-

gation. The Administrator should in that event be called upon to make some additional showing to justify an investigation under Section 11 (a). In such cases it would appear upon the face of the pleadings that, absent some special circumstances, the records were palpably irrelevant to any inquiry to ascertain violations of the Act. But in other cases, even though coverage be doubtful, where the Administrator is satisfied that there is cause to investigate he should not be required to satisfy the court by prima facie proof of coverage of the particular employer. The very purpose of the investigation is to resolve doubts. To go further and require the Administrator to introduce evidence to "satisfy" the court that he has "probable cause" to believe that respondent is covered by the Act is to restrict unduly that cooperation between Administrator and courts upon which enforcement of the Act depends. It is precisely in those situations where coverage is not readily apparent and where the facts are most difficult to ascertain that the Administrator needs the aid of the courts in carrying out his investigation.

The present cases, however, are not doubtful ones and the pleadings and affadavits before the district courts plainly showed "probable cause" as to coverage. This Court "need not again pass upon the contention that trade in news carried on among the states is not interstate commerce" (*Associated Press* v. *United States,* Nos. 57, 58, 59,

October Term, 1944, slip opinion, p. 9), previously rejected in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103. Nor is there any question that Congress intended the Fair Labor Standards Act to apply to newspapers. Section 13 (a) (8) specifically exempts certain classes of local weekly and semi-weekly papers of limited circulation.[11] Whether a particular newspaper or its employees fall within or without the scope of the Act is a question which can only be determined on the basis of the particular facts relating to them. Since the industry is unques-

[11] The Act has been held applicable to employees of newspapers in *Sun Publishing Co.* v. *Walling*, 140 F. 2d 445 (C. C. A. 6), certiorari denied, 322 U. S. 728; *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907 (N. D. Tex.), affirmed, 121 F. 2d 207, affirmed, 316 U. S. 624; *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (D. Mass.), reversed on other grounds, 120 F. 2d 213 (C. C. A. 1), affirmed *per curiam*, 315 U. S. 784.

Petitioners' reliance on the decision of the Circuit Court of Appeals for the Fourth Circuit in *Schroepfer* v. *A. S. Abell Co.*, 138 F. 2d 111, is misplaced. That suit involved the coverage of newspaper rackmen whose only duties related to the delivery of papers to local distribution racks and who had nothing to do with collecting news, assembling and printing the paper, or any other activity in which interstate commerce was involved. Petitioners make no reference to the explicit recognition by the Fourth Circuit that some of the newspaper's employees were unquestionably engaged in interstate commerce and therefore subject to the Act. The first sentence of the court's opinion, immediately following its summary of the facts, reads as follows (p. 113):

> There is no question but that the defendant is engaged in interstate commerce with respect to the publication of its papers, the gathering of news therefor and the sale of the portion of its papers sent out of the state.

tionably one usually engaged in interstate commerce, nothing more need be shown even to establish "probable cause".

Furthermore, in the instant cases the nature of the industry and the normal presumption that the Administrator has reasonable grounds to believe coverage exists are buttressed by the facts appearing in the pleadings and affidavits. In the *Oklahoma Press* case, No. 61, the petitioner's contention that its newspaper publishing business is a wholly local activity to which the Act is inapplicable is defeated by its own admissions. Under the admitted facts, petitioner as publisher of two daily newspapers (R. 19) in Muskogee, Oklahoma, is in continuous receipt of out-of-State news and advertising material which it incorporates in its papers (R. 23–24), and regularly ships in interstate commerce a small number of newspapers (about 204 daily) to out-of-State readers and advertisers (R. 20, 54). The editorial staffs handle, select, edit, and write headlines for national and international press reports received by teletype machines located in the newspaper offices (R. 23–24). It is common knowledge that national and world news is made available to newspapers like those owned by petitioner through membership in interstate wire services [12] and that such newspapers supply local news of national

[12] Petitioner subscribes to both the Associated Press and the United Press services. *Editor and Publisher International Year Book* (1945), p. 102.

interest to those wire services. Similarly in No. 63, petitioner admits that a daily average of 278 of a total circulation of 27,470 of the Paterson Evening News is to readers outside the State of New Jersey (R. 20).[13] This petitioner, like the Oklahoma Press Company, subscribes to both the Associated Press and United Press services. *Editor and Publisher International Year Book* (1945) p. 80. If the allegation of the Administrator standing alone were insufficient to justify enforcement of the subpoena, the showing of these additional facts was certainly adequate to indicate that the investigations were not unwarranted.

III

THE SUBPOENAS HERE INVOLVED COMPLY FULLY WITH THE REQUIREMENTS OF THE FOURTH AMENDMENT

In asserting that the subpoenas infringe their rights under the Fourth Amendment,[14] petitioners

[13] That the number of papers regularly sent outside the State is small does not render the interstate activity of the petitioners immune from Congressional regulation and the Act makes "no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer", *United States* v. *Darby*, 312 U. S. 100, 123. Besides, the interstate circulation is only one of the circumstances of petitioners' activities which bears on the application of the Act to their various employees. *Fleming* v. *Lowell Sun Co.*, *supra*, 36 F. Supp. at 326. See also *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564.

[14] It is not clear whether petitioner in No. 61 makes this contention, but since page 12 of the brief may be thought to

rely chiefly upon the case of *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298. In the *American Tobacco* case, however, the subpoena was not limited to documents which would have been material or relevant to a lawful inquiry, but extended to substantially all of the respondent's papers "relevant or irrelevant, in the hope that something [would] turn up." (264 U. S. at p. 306.) See *Fleming* v. *Montgomery Ward & Co.*, 114 F. 2d 384 (C. C. A. 7), certiorari denied, 311 U. S. 690. If the demand of a subpoena is reasonably specific and limited to documents pertinent to the inquiry then in progress, the requirements of the Fourth Amendment are satisfied. *Wilson* v. *United States*, 221 U. S. 361, 376; *Essgee Co.* v. *United States*, 262 U. S. 151, 157; *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Comm.*, 221 U. S. 612, 622.

These decisions are a sufficient answer to petitioners' attempt to analogize the subpoenas here to the writs of assistance which provoked James Otis' eloquent attack. If these decisions are reexamined in the light of Otis' speech in 1761 in *Paxton's Case*, Quincy's (Mass.) Reports (1761–1772) 51, and of other data bearing upon the historical meaning of the Fourth Amendment, their interpretation of the Amendment is confirmed. Historically, the Fourth Amendment was

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incorporate the argument made in Point 2 of the brief in No. 63, we have treated the point as though made in both cases.

based on the provision in the Declaration of Rights of the Massachusetts Constitution of 1780,[15] which in turn was aimed at the evils of the writs of assistance. The vice of these writs was that they were general, authorizing searches in any place for "uncustomed" goods; they were universal, directed to all the King's subjects; they were transferable; and they were perpetual, requiring no return. It was these features to which the colonists objected and which they later wished to prohibit. In John Adams' account of James Otis' speech in *Paxton's Case*, it is made clear that it was the generality of the writs of assistance which was the basis of objection. Otis said:

> In the first place, may it please your Honors, I will admit that writs of one kind may be legal; that is, special writs, directed to special officers, and to search certain houses, etc., specially set forth in the writ, may be granted by the Court of Exchequer at home, upon oath made before the Lord Treasurer by the person who asks it, that he suspects such goods to be concealed in those very places he desires to search. * * *

[15] Art. XIV: "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases and with the formalities prescribed by the laws.

> I rely on it, that the writ prayed for in this petition, being general, is illegal. * * * * * * special writs may be granted *on oath and probable suspicion.* [Italics in the original.] Adams, Works, II, 524, 525.

See also Quincy's (Mass.) Reports (1761–1772) 51*ff.*, and the historical essay on writs of assistance by Horace Gray, *ibid.*, 395–540. Where, as here, there is no element of compulsory self-incrimination (cf. *Boyd* v. *United States*, 116 U. S. 616), the Fourth Amendment has been consistently interpreted in accordance with this historical background.

The subpoenas in the instant cases have no oppressive features. They are specific. They call for records clearly relevant to the inquiry which the Administrator was conducting under the authority of the statute. That in No. 61 (R. 11) is limited to specific books and papers showing the wages and hours of the Oklahoma Press Publishing Company's employees during a particular period and those showing the sources and receipt of out-of-State news and advertising and the out-of-State distribution of newspapers during the same period. That in No. 63 (R. 8–9) calls for the production of the News Printing Company's records showing the wages paid to and the hours worked by its employees and pertaining to the goods sold, transported, or offered for transportation, all with respect to a designated place of

business and for a specified period. The demands are specific and definite and such that those to whom they are addressed could not misunderstand what they were required to produce.

In No. 63 petitioner argues[16] that the Circuit Court of Appeals' decision, permitting the Administrator "in the absence of complaint" to subpoena its records to determine whether or not it had violated the Act, infringes rights guaranteed by the Fourth Amendment. Petitioner quotes the District Court's statement that the subpoena was issued "without complaint and simply in quest of information upon which to base proceedings, should they be justified" (R. 25, br. 15). It is not clear from the brief whether the infirmity claimed is the absence of a formal complaint by the Administrator charging violations before the issuance of the subpoena, or the absence of any complaint from third persons to the Administrator. If the objection is that the Administrator had issued no formal complaint charging a violation of the Act (the procedure under the Public Contracts Act), the objection is irrelevant. Under the Fair Labor Standards Act the Administrator has no authority to issue complaints, and no constitutional limitation is offended by the failure of the statute to provide for a formal administrative charge or complaint prior to investigation. See *Hale* v. *Henkel,* 201 U. S. 43.

[16] See fn. 14, *supra.*

If the objection is that no complaint had been made to the Administrator,[17] petitioner's argument that investigation without the existence of such a complaint was contrary to the Congressional intent is plainly devoid of substance. Section 11 (a) makes it the very purpose of the investigation to uncover violations and does not contemplate that the Administrator shall withhold inquiry until prodded by the complaint of one who is under no duty to discover violations. Nevertheless, the brief in No. 63 (pp. 16–18) develops at length an alleged controversy between Congress and a former Administrator of the Wage and Hour Division as to the manner in which appropriations should be expended upon inspections in the absence of such complaints. This history would be irrelevant in any event since the issue as to the most efficient use of appropriations is a matter between Congress and the Administrator

[17] The record does not support a statement that no complaint had in fact been made to the Administrator. The subpoena recites that the investigation was "of complaints of violations" (R. 8). Paragraph 6 of the return to the order to show cause apparently denies "on information and belief" (R. 17) that there had been complaint of violations lodged against petitioner with the Administrator, but Judge Meaney made no findings of fact on this or any of the other factual matters in issue. Judge Meaney's statement in his opinion quoted above seems plainly to refer to the circumstance that no administrative complaint preceded the investigation and was apparently made for the purpose of distinguishing the procedure in this case from that under the Public Contracts Act.

and not one to be determined in litigation between the Administrator and employers under investigation.

Nevertheless it should be stated that the petitioner completely misinterprets the controversy in suggesting that Congress had disapproved of any practice which involved the making of investigations under Section 11 (a) prior to the receipt of complaints from competitors, employees, or others that violations were occurring in an employer's plants. The conflict in 1941 and 1942 between the Administrator and members of the House Appropriations Committee arose over the desire of the Administrator to make a periodic routine inspection of every plant in the United States that might be covered by the Act. Although the Senate was apparently willing to appropriate money for that purpose, the House of Representatives objected and appropriated money adequate only for the routine investigation of about 25 percent of these plants—approximately 75,000—in addition to plants against which complaints had been made to the Administrator.[18] 87 Cong. Rec. 5682–3 (1941). In fact, when it was suggested by the Administrator that the Congressional policy seemed to limit his investigation to

[18] The reduction in appropriation below the budget estimates made for the fiscal year 1942 was caused by the fact that there were unexpended balances in the preceding year and the House thought it unnecessary to increase the appropriation. 87 Cong. Rec. 4629, 5683 (1941).

those cases in which he had received complaints, Representative Tarver, who was in charge of the bill, specifically repudiated that interpretation.[19] 87 Cong. Rec. 5683 (1941). The comment in the report on the Appropriation Bill for 1943 which petitioner quotes at page 17 of its brief referred to what the Committee took to be a continued attempt by the Administrator to inspect every plant which he believed might be covered by the Act.[20] Since that time no question has been raised with respect to the inspection policy, which complies with that proposed by Representative Tarver in 1941. In the hearings on the Appropriation Bill for 1945[21] this policy was approved by members of the committee, and in hearings on the 1946 appropriation no question was raised with regard to it.

IV

THE APPLICATION OF THE WAGE AND HOURS STANDARDS OF THE ACT TO THOSE IN THE NEWSPAPER PUBLISHING BUSINESS DOES NOT VIOLATE THE CONSTITUTIONAL GUARANTY OF A FREE PRESS

It is well settled by the decisions of this Court that the press as such is not immune from the ap-

[19] See also Hearings before the Subcommittee of the House Appropriations Committee on the Department of Labor-Federal Security Agency Appropriation Bill for 1942, 77th Cong., 1st sess., pp. 347–350.

[20] See id., Hearings, 1943, 77th Cong., 2d sess. (1942), pp. 281–4.

[21] Id., Hearings, 1945, 78th Cong., 2d sess. (1941), pp. 403–4.

plication of general laws. In the light of the opinions of all the Justices in *Associated Press* v. *United States,* Nos. 57, 58, 59, October Term, 1944, confirming the view which was taken in *Associated Press* v. *National Labor Relations Board,* 301 U. S. 103, repetition of the argument in support of this proposition is superfluous.

Petitioners argue that application of the Fair Labor Standards Act to newspapers will increase their cost of doing business and hence amounts to a restriction of freedom of the press. The fact that the cost of doing business is increased by application of the Act no more infringes the guaranty of the First Amendment than does the increased cost of doing business which is entailed by the imposition of property and income taxes upon newspapers. The freedom of the press is not abridged by protection of the employees of newspapers from working under substandard labor conditions. The First Amendment is not a guaranty of profits. The regulation here does not "trespass upon the domains set apart for free speech" (*Thomas* v. *Collins,* 323 U. S. 516, 532) any more than do safety and sanitary laws, zoning ordinances, or wartime allocation and priority controls. There is here no attempt at a "guardianship of the public mind" such as was involved in *Largent* v. *Texas,* 318 U. S. 418, or any form of censorship or previous restraint of discussion condemned in *Bridges* v. *California,* 314 U. S. 252; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Thornhill*

v. *Alabama*, 310 U. S. 88; *Schneider* v. *State*, 308 U. S. 147; *Hague* v. *C. I. O.*, 307 U. S. 496; *Lovell* v. *Griffin*, 303 U. S. 444; or *Near* v. *Minnesota*, 283 U. S. 697.

Even though freedom of the press is "in a preferred position" (*Murdock* v. *Pennsylvania*, 319 U. S. 105, 115; *Follett* v. *McCormick*, 321 U. S. 573), the press is not free from all regulatory measures. Although a license tax on the right to distribute books and pamphlets may be invalid as a direct restriction of circulation and as a restraint equally obnoxious to that imposed by censorship or previous restraint, the Fair Labor Standards Act is neither a tax nor a direct restraint. The preferred position to which the press is entitled is based on its function as a medium of public information. Insofar as a newspaper is a business for profit it is not entitled to immunity from the public policies applicable to other businesses, such as those embodied in the National Labor Relations Act and the Fair Labor Standards Act.

The final argument that the exemption of certain weekly newspapers of local circulation by Section 13 (a) (8) of the Act is a discriminatory classification which invalidates the application of Sections 6 and 7 to the petitioners is plainly without substance. This court has pointed out time and again that the Fifth Amendment does not require the full and uniform exercise of the commerce power and that Congress may weigh

relative needs and limit the application of particular legislative policies. *Steward Mach. Co.* v. *Davis,* 301 U. S. 548; *Currin* v. *Wallace,* 306 U. S. 1. See also *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445, 448 (C. C. A. 6), certiorari denied, 322 U. S. 728. The discriminatory tax involved in *Grosjean* v. *American Press,* 297 U. S. 233, 250–251, was held invalid because it was found to be a "deliberate and calculated device" to penalize "a selected group of newspapers." This Court has never suggested that either the First or the Fifth Amendment requires Congress to regulate or tax all sources of public information alike or not at all.

CONCLUSION

For the foregoing reasons, the decisions of the Circuit Courts of Appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1945.

APPENDIX

Fair Labor Standards Act, c. 676, 52 Stat. 1060 (29 U. S. C. 201 et seq.):

SEC. 9. For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers, and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees.

* * * * *

SEC. 11 (a). The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in

section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act.

SEC. 13 (a).

The provisions of sections 6 and 7 shall not apply to . . . (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed and published;

Federal Trade Commission Act, 38 Stat. 717 (15 U. S. C. 49):

SEC. 9.

* * * * *

* * * in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

* * * * *

No person shall be excused from attending and testifying or from producing docu-

mentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

U. S. GOVERNMENT PRINTING OFFICE: 1948

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SUPREME COURT OF THE UNITED STATES.

Nos. 61, 63.—October Term, 1945.

Oklahoma Press Publishing Company, Petitioner, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
61	
New Printing Co., Inc., Petitioner, *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
63	

[February 11, 1946.]

Mr. Justice Rutledge delivered the opinion of the Court.

These cases bring for decision important questions concerning the Administrator's right to judicial enforcement of *subpoenas duces tecum* issued by him in the course of investigations conducted pursuant to § 11(a) of the Fair Labor Standards Act. 52 Stat. 1060. His claim is founded directly upon § 9, which incorporates the enforcement provisions of §§ 9 and 10 of the Federal Trade Commission Act, 38 Stat. 717.[1] The subpoenas sought the production of specified records to determine whether petitioners were violating the Fair Labor Standards Act, including records relating to coverage. Petitioners, newspaper publishing corporations, maintain that the Act is not applicable to them, for constitutional and other reasons, and insist that the question of coverage must be adjudicated before the subpoenas may be enforced.

In No. 61, involving the Oklahoma Press Publishing Company, the Circuit Court of Appeals for the Tenth Circuit has rejected this view, holding that the Administrator was entitled to enforce-

[1] The pertinent portions of these various statutory provisions are set forth in notes 23 and 24.

ment upon showing of "probable cause," which it found had been made. 147 F. 2d 658. Accordingly it affirmed the District Court's order directing that the Administrator be given access to the records and documents specified.[2]

In No. 63, the Circuit Court of Appeals for the Third Circuit likewise rejected the company's position, one judge dissenting on the ground that probable cause had not been shown. 148 F. 2d 57. It accordingly reversed the District Court's order of dismissal in the proceeding to show cause, which in effect denied enforcement for want of a showing of coverage. 49 F. Supp. 659.[3] The Court of Appeals thought that requiring the Administrator "to make proof of coverage would be to turn the proceeding into a suit to decide a question which must be determined by the Administrator in the course of his investigation" and relied upon *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, as being persuasive that this could not be done. Regarding the subpoena as containing no unreasonable demand, it conceived the return and affidavits filed by the company, together with the Administrator's allegations of coverage,[4] as a showing sufficient to require enforcement. Hence it directed that the District Court's discretion be exercised with that effect.

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[2] Upon filing of the application, an order to show cause why enforcement should not be had was issued. Thereafter the matter was heard upon the pleadings, including the application and the respondent's return, together with affidavits filed by the parties. See note 4; also note 52 *infra*. The District Court made findings of fact and conclusions of law, see 7 Wage Hour Rep. 665, which among other things determined "that the Company herein is subject to the Wage and Hour Act"; and issued its order for inspection accordingly. As to this finding and conclusion the Court of Appeals said: "When the matter was submitted to the trial court on the rule to show cause, it concluded coverage, but it did not have to go that far." 147 F. 2d 658, 662.

[3] In No. 63, as in No. 61, an order to show cause issued on filing of the application. Upon return made, which included affidavits attached as exhibits, the Court rendered its opinion and entered its order dismissing the proceedings, stating however that since the Administrator "has not had opportunity sufficiently to argue the question of coverage, that matter is left to such further proceedings as may be appropriate. . . ." 49 F. Supp. 659, 661. The opinion, noting that to deny enforcement "would be to divide the proceedings into two distinct stages," one "concerning the presence of 'Commerce,' the other to determine other elements of violation," went on to say: "There would seem to be no compelling reason why such should not be the case, for if the act does not apply to a certain business or part of an industry, it would seem to follow that the provisions of the act should not be applied thereto. . . ." 49 F. Supp. at 660.

[4] See note 53. The allegations of coverage in both applications were made upon information and belief and were general rather than specific

Because of the importance of the issues for administration of the Act and also on account of the differences in the grounds for the two decisions, as well as between them and decisions from other circuits,[5] certiorari was granted in both cases. 325 U. S. 845.

The issues have taken wide range. They are substantially the same in the two causes, except in one respect to be noted.[6] In addition to an argument from Congress' intent, reliance falls upon various constitutional provisions, including the First, Fourth and Fifth Amendments, as well as the limited reach of the commerce clause, to show that the Administrator's conduct and the relief he seeks are forbidden.

I.

Coloring almost all of petitioners' position, as we understand them, is a primary misconception that the First Amendment knocks out any possible application of the Fair Labor Standards Act to

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or evidentiary in character. Each application set forth that the respondent was engaged in the business of publishing a newspaper or newspapers and by virtue of that activity was engaged in interstate commerce or in the production of goods for such commerce within the meaning of the Act.

In No. 61 the further allegations appeared that in the course of its business the company "receives and sends daily news, intelligence, and communications in interstate commerce, and transports, ships and delivers goods produced by it from points within" to points outside Oklahoma; and that the Administrator "having reasonable grounds to believe that the company" was violating specified sections of the Act, entered to make an investigation as provided in § 11(a), was refused permission to inspect records, etc.

Apart from one affidavit filed by the Administrator in No. 61 setting forth the circumstances of the company's failure to appear in response to the subpoena, no other facts, beyond the allegations of the application, were submitted by him in either case. The companies however filed affidavits in both proceedings, which supplied additional facts, as well as the affiants' conclusions, concerning coverage. See text, Part IV, at notes 52, 53.

[5] Specifically, General Tobacco & Grocery Co. *v.* Fleming, 125 F. 2d 596 (C. C. A. 6), modified in Walling *v.* La Belle Steamship Co., 148 F. 2d 198, following the decision in Endicott Johnson Corp. *v.* Perkins, 317 U. S. 501, as to which see note 49 *infra* and text. The decisions in other circuits which have passed on the matter are substantially in accord with the results in No. 61. See Martin Typewriter Co. *v.* Walling, 135 F. 2d 918 (C. C. A. 1); Walling *v.* Standard Dredging Corp., 132 F. 2d 322 (C. C. A. 2); Walling *v.* American Rolbal Corp., 135 F. 2d 1003 (C. C. A. 2); Cudahy Packing Co. *v.* Fleming, 119 F. 2d 209 (C. C. A. 5), rev'd on other grounds, 315 U. S. 357; Cudahy Packing Co. *v.* Fleming, 122 F. 2d 1005 (C. C. A. 8), rev'd on other grounds, 315 U. S. 785; Mississippi Road Supply Co. *v.* Walling, 136 F. 2d 391 (C. C. A. 5); Fleming *v.* Montgomery Ward Co., 114 F. 2d 384 (C. C. A. 7); Walling *v.* Benson, 137 F. 2d 501 (C. C. A. 8).

[6] See Part IV.

the business of publishing and distributing newspapers. The argument has two prongs.

The broadside assertion that petitioners "could not be covered by the Act," for the reason that "application of this Act to its newspaper publishing business would violate its rights as guaranteed by the First Amendment," is without merit. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, and *Associated Press* v. *United States*, 326 U. S. 1; *Mabee* v. *White Plains Pub. Co.*, No. 57, decided this day.[7] If Congress can remove obstructions to commerce by requiring publishers to bargain collectively with employees and refrain from interfering with their rights of self-organization, matters closely related to eliminating low wages and long hours, Congress likewise may strike directly at those evils when they adversely affect commerce. *United States* v. *Darby*, 312 U. S. 100, 116, 117. The Amendment does not forbid this or other regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes.[8]

Petitioners' narrower argument, of allegedly invalid classification,[9] arises from the statutory exemptions and may be shortly dismissed. The intimation that the Act falls by reason of the exclusion of seamen, farm workers and others by § 13(a) is hardly more than a suggestion and is dismissed accordingly. Cf. *Buck* v. *Bell*, 274 U. S. 200, 208. The contention drawn from the exemption of employees of small newspapers by § 13(a)(8) deserves only slightly more attention.[10] It seems to be twofold, that the amendment forbids Congress to "regulate the press by classifying

[7] See also Sun Publishing Co. v. Walling, 140 F. 2d 445; Fleming v. Lowell Sun Co., 36 F. Supp. 320, rev'd on other grounds, 120 F. 2d 213, affirmed, 315 U. S. 784.

[8] No question is presented whether Congress could enforce its mandate by excluding from commerce the circulation of a publisher refusing to conform. Cf. Sun Publishing Co. v. Walling, 140 F. 2d 445, 449.

[9] Since the Fifth Amendment, unlike the Fourteenth, contains no "equal protection" clause petitioners burden due process with this duty here.

[10] The provision is as follows: "Sec. 13(a): The provisions of sections 6 and 7 shall not apply with respect to . . . (8) any employee employed in connection with the publication of any weekly or semiweekly newspaper with a circulation of less than three thousand the major part of which circulation is within the county where printed or published."

The exemption shows conclusively that Congress intended the Act to apply to employees of publishers not within the terms of the exemption.

it" at all and in any event that it cannot use volume of circulation or size as a factor in the classification.[11]

Reliance upon *Grosjean* v. *American Press Co.*, 297 U. S. 233, to support these claims is misplaced. There the state statute singled out newspapers for special taxation and was held in effect to graduate the tax in accordance with volume of circulation. Here there was no singling out of the press for treatment different from that accorded other business in general. Rather the Act's purpose was to place publishers of newspapers upon the same plane with other businesses and the exemption for small newspapers had the same object. 83 Cong. Rec. 7445. Nothing in the *Grosjean* case forbids Congress to exempt some publishers because of size from either a tax or a regulation which would be valid if applied to all.

What has been said also disposes of the contention drawn from the scope of the commerce power and its applicability to the publishing business considered independently of the Amendment's influence. *Associated Press* v. *National Labor Relations Board*, *supra*; *Associated Press* v. *United States*, *supra*.

II.

Other questions pertain to whether enforcement of the subpoenas as directed by the Circuit Courts of Appeals will violate any of petitioners' rights secured by the Fourth Amendment and related issues concerning Congress' intent. It is claimed that enforcement would permit the Administrator to conduct general fishing expeditions into petitioners' books, records and papers, in order to secure evidence that they have violated the Act, without a prior charge or complaint and simply to secure information upon which to base one, all allegedly in violation of the Amendment's search and seizure provisions. Supporting this is an argument that Congress did not intend such use to be made of the delegated power, which rests in part upon asserted constitutional implications but primarily upon the reports of legislative committees, particularly in the House of Representatives, made in passing upon appropriations for years subsequent to the Act's effective date.[12]

[11] To support these views, petitioners give interesting statistics concerning the total number of papers in the country, the number published daily, daily and Sunday, weekly, semiweekly and triweekly, and the number in each group having more or less than 3,000 circulation.

[12] See note 21. The Act became effective June 25, 1938.

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside.[13] No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made.[14] Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them.[15]

What petitioners seek is not to prevent an unlawful search and seizure. It is rather a total immunity to the Act's provisions, applicable to all others similarly situated, requiring them to submit their pertinent records for the Administrator's inspection under every judicial safeguard, after and only after an order of court made pursuant to and in exact compliance with authority granted by Congress. This broad claim of immunity no doubt is induced by petitioners' First Amendment contentions. But beyond them it is rested also upon conceptions of the Fourth Amendment equally lacking in merit.

Petitioners' plea that the Fourth Amendment places them so far above the law that they are beyond the reach of congressional and judicial power as those powers have been exerted here only raises the ghost of controversy long since settled adversely to their claim.[16] They have advanced no claim founded on the Fifth Amendment's somewhat related guaranty against self-incrimination, whether or not for the sufficient reason among others that this privilege gives no protection to corporations or their officers against the production of corporate records pursuant to lawful judicial order, which is all these cases involve.[17]

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[13] As to the sufficiency of the showing, see Part IV.

[14] Cf. notes 2, 3, 4. The facts in both cases show that petitioners, when served with the subpoenas, declined to honor them upon the advice of counsel, and thereafter the Administrator applied to the court for enforcement in each case.

[15] Cf. text *infra* at notes 42-47: see also note 40.

[16] See the authorities cited in notes 31 and 32.

[17] Hale v. Henkel, 201 U. S. 43; Wilson v. United States, 221 U. S. 361; Essgee Co. v. United States, 262 U. S. 151; United States v. Bausch & Lomb Optical Co., 321 U. S. 707, 726; cf. United States v. White, 322 U. S. 694.

The cited authorities would be sufficient to dispose of the Fourth Amendment argument, and more recent decisions confirm their ruling.[18] Petitioners however are insistent in their contrary views, both upon the constitutional phases and in their asserted bearing upon the intention of Congress. While we think those views reflect a confusion not justified by the actual state of the decisions, the confusion has acquired some currency, as the divided state of opinion among the circuits shows.[19] Since the matter is of some importance, in order to remove any possible basis for like misunderstanding in the future, we give more detailed consideration to the views advanced and to the authorities than would otherwise be necessary.

There are two difficulties with petitioners' theory concerning the intent of Congress. One is that the argument from the so-called legislative history flies in the face of the powers expressly granted to the Administrator and the courts by §§ 9 and 11(a), so flatly that to accept petitioners' view would largely nullify them.[20] Furthermore the excerpted history from the later appropriation matters does not give the full story and when that is considered the claimed interpretation is not made out, regardless of its retrospective aspect.[21] Moreover, the statute's language

[18] Endicott Johnson Corp. *v.* Perkins, 317 U. S. 501; Myers *v.* Bethlehem Corp., 303 U. S. 41, discussed *infra*, Part III, at notes 49-51.

[19] Cf. note 5 and text.

[20] In such a situation, without an accompanying change in the statute's language, an expression in committee reports on subsequent appropriations, coming largely from one house, hardly can be held to change or qualify the plain and unambiguous wording of the statute. Such a result would amount to retroactive amendment by committee report, a step in construction by reference to "prospective legislative history" not heretofore taken.

[21] The controversy as to appropriations arose over the Administrator's request for sufficient funds to allow a periodic routine inspection of every plant that might be covered by the Act. See Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1942, 77th Cong., 1st Sess., Pt. 1, 347-350. The Senate had acceded to this request. But the House Appropriations Committee thought the cost unjustifiable and therefore recommended that only enough funds be made available to permit the Administrator to make "spot inspections" of twenty-five per cent of the plants and also to permit him to inspect all plants against which complaints had actually been registered. H. R. Rep. No. 688, 77th Cong., 1st Sess., 13-14; see also 87 Cong. Rec. 4629, 5682-5683. After the conferees had been unable to come to an agreement and the House had instructed its conferees to insist on the smaller appropriation, 87 Cong. Rec. 5682-5686, the Senate accepted the House version of the appropriation bill. 87 Cong. Rec. 5703.

In the following year, 1942, the House Appropriations Committee noted with disapproval that "the spot-checking system approved by the Congress"

leaves no room to doubt that Congress intended to authorize just what the Administrator did and sought to have the courts do.[22]

Section 11(a) expressly authorizes the Administrator to "enter and inspect such places and such records (and make such transcriptions), question such employees, and investigate such facts, conditions, practices or matters as he may deem appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."[23] The subpoena power conferred by § 9 (through

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had not been adopted and reiterated its desire that the recommended procedure be followed. H. Rep. No. 2200, 77th Cong., 2d Sess., 8. See also Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1943, 77th Cong., 2d Sess., Pt. 1, 281-284; cf. Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives on the Department of Labor—Federal Security Agency Appropriation Bill for 1945, 78th Cong., 2d Sess., Pt. 1, 403-405.

This history falls far short of sustaining the view that Congress had no intent, either when the statute was enacted or later, that the Administrator should have the powers of investigation expressly and clearly conferred upon him.

[22] The sparse legislative history bearing on the question contains nothing to the contrary. The bills originally introduced did not incorporate §§ 9 and 10 of the Federal Trade Commission Act but contained substantially similar provisions. S. 2475, 75th Cong., 1st Sess., § 15, 81 Cong. Rec. 4961; H. R. 7200, 75th Cong., 1st Sess., § 15, 81 Cong. Rec. 4998. The House Committee on Labor reported of this section (then § 12) that it "contains the usual administrative provisions authorizing the Board to conduct investigations, subpena witnesses, and compel testimony." H. Rep. No. 1452, 75th Cong., 1st Sess., 18, also page 10. The Senate Committee used the same language. Sen. Rep. No. 884, 75th Cong., 1st Sess., 8. The House bill having been recommitted to the Committee, 82 Cong. Rec. 1834-1835, it drafted the subpoena section (then § 7) into essentially its present form. See H. R. Rep. No. 2182, 75th Cong., 2d Sess., 3, 11. The only substantial difference was that the subpoena power was given for the purpose of any "hearing" but not for the purpose of any "investigation." However, § 15(b) of the bills introduced in both houses, *supra*, granted the subpoena power "for the purpose of any investigation or any other proceeding under this Act. . . ." And compare § 15(a). The difference was remedied by the Senate and House conferees; for out of conference came § 9 as it is now written. 83 Cong. Rec. 9160; 83 Cong. Rec. 9248, 9254. See also Cudahy Packing Co. *v.* Holland, 315 U. S. 357, 362, n. 3.

Nothing in the reports or the discussion suggests that the power was not to be exercised, or that subpoenas issued in compliance with the terms of the statute were not to be enforced, exactly in accordance with the authority given.

[23] Section 11(a) is as follows: "The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. Except as provided in section 12 and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of

adoption of § 9 of the Federal Trade Commission Act) is given in aid of this investigation and, in case of disobedience, the district courts are called upon to enforce the subpoena through their contempt powers,[24] without express condition requiring showing of coverage.[25]

In view of these provisions, with which the Administrator's action was in exact compliance, this case presents an instance of

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Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Administrator shall bring all actions under section 17 to restrain violations of this Act."

The section thus authorizes both general and specific investigations, one for gathering statistical information concerning entire industries, cf. Walling v. American Rolbal Corp., 135 F. 2d 1003, the other to discover specific violations. The pattern has become common since its introduction into federal law by the Interstate Commerce Commission legislation. See the summary given as to both federal and state instances in Handler, The Constitutionality of Investigations by the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, at 905-909; see also 925-929.

[24] Section 9 of the Fair Labor Standards Act reads: "For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C., 1934 edition, title 15, secs. 49 and 50), are hereby made applicable to the jurisdiction, powers and duties of the Administrator, the Chief of the Children's bureau, and the industry committees."

Section 9 of the Federal Trade Commission Act, 38 Stat. 717, provides that, for the purposes of the authorized investigations, the Commission or its agents shall have access to and the right to copy "any documentary evidence of any corporation being proceeded against," with the power to require by subpoena "the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation."

The section then proceeds: " . . . in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof."

Section 9 also contains a provision for immunity of individuals from prosecution, penalty or forfeiture on account of testimony or evidence produced in response to the subpoena.

Section 10 imposes criminal penalties upon "any person who shall refuse or neglect to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission." No question is presented in these cases concerning this provision.

[25] See Part IV, at note 54; also note 24.

"the most explicit language"[26] which leaves no room for questioning Congress' intent. The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the Administrator's judgment, the facts thus discovered should justify doing so.

Accordingly, if §§ 9 and 11(a) are not to be construed as authorizing enforcement of the orders, it must be, as petitioners say, because this construction would make them so dubious constitutionally as to compel resort to an interpretation which saves rather than to one which destroys or is likely to do so. The Court has adopted this course at least once in this type of case.[27] But if the same course is followed here, the judgments must be reversed with the effect of cutting squarely into the power of Congress. For to deny the validity of the orders would be in effect to deny not only Congress' power to enact the provisions sustaining them, but also its authority to delegate effective power to investigate violations of its own laws, if not perhaps also its own power to make such investigations.

III.

The primary source of misconception concerning the Fourth Amendment's function lies perhaps in the identification of cases involving so-called "figurative" or "constructive" search with cases of actual search and seizure.[28] Only in this analogical sense

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[26] See note 27.

[27] See Federal Trade Commission *v.* American Tobacco Co., 264 U. S. 298, 305-306, in which Mr. Justice Holmes speaking for the Court said: "Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent." See also note 40. Cf. Boyd *v.* United States, 116 U. S. 616; Hale *v.* Henkel, 201 U. S. 43; Harriman *v.* Interstate Commerce Commission, 211 U. S. 407.

[28] "In other words, the subpoena is equivalent to a search and seizure and to be constitutional it must be a *reasonable* exercise of the power." Lasson, Development of the Fourth Amendment to the United States Constitution, 137, citing Interstate Commerce Commission *v.* Brimson, 154 U. S. 447; Hale *v.* Henkel, 201 U. S. 43, 76. Cf. Boyd *v.* United States, 116 U. S. at 634-635 (as to which see also notes 33 and 36): "... We are further of opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited ... is the equivalent of a search and seizure—

can any question related to search and seizure be thought to arise in situations which, like the present ones, involve only the validity of authorized judicial orders.

The confusion is due in part to the fact that this is the very kind of situation in which the decisions have moved with variant direction, although without actual conflict when all of the facts in each case are taken into account. Notwithstanding this, emphasis and tone at times are highly contrasting, with consequent overtones of doubt and confusion for validity of the statute or its application. The subject matter perhaps too often has been generative of heat rather than light, for the border along which the cases lie is one where government intrudes upon different areas of privacy and the history of such intrusions has brought forth some of the stoutest and most effective instances of resistance to excess of governmental authority.[29]

The matter of requiring the production of books and records to secure evidence is not as one-sided, in this kind of situation, as the most extreme expressions of either emphasis would indicate. With some obvious exceptions, there has always been a real problem of balancing the public interest against private security. The cases for protection of the opposing interests are stated as clearly as anywhere perhaps in the summations, quoted in the margin,[30] of two former members of this Court, each of whom was

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and an unreasonable search and seizure—within the meaning of the Fourth Amendment."

See also Handler, Constitutionality of Investigations of the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, at 909 ff., and authorities cited, characterizing the identification of an order for production with an actual search or seizure as "the figurative interpretation." P. 917, n. 56.

[29] See, in addition to the better known accounts of writs of assistance cited in Goldman v. United States, dissenting opinion, 316 U. S. at 139, n. 5, Lasson, Development of the Fourth Amendment to the United States Constitution (1937).

[30] The case for protection of the public interest was stated as follows: "The opinion of the court reminds us of the dangers that wait upon the abuse of power by officialdom unchained. The warning is so fraught with truth that it can never be untimely. But timely too is the reminder, as a host of impoverished investors will be ready to attest, that there are dangers in untruths and half truths when certificates masquerading as securities pass current in the market. There are dangers in spreading a belief that untruths and half truths, designed to be passed on for the guidance of confiding buyers, are to be ranked as peccadillos, or even perhaps as part of the amenities of business. . . . A Commission which is without coercive powers, which cannot arrest or amerce or imprison though a crime has been uncovered, or even punish for contempt, but can only inquire and report, the propriety of every question in the course of the inquiry being subject to the supervision of the ordinary courts of justice, is likened with denunciatory fervor to the Star

fully alive to the dual necessity of safeguarding adequately the public and the private interest. But emphasis has not always been so aptly placed.

The confusion, obscuring the basic distinction between actual and so-called "constructive" search has been accentuated where the records and papers sought are of corporate character, as in these cases. Historically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state,[31] when their activities take place within or affect interstate commerce.[32] Correspondingly it has been settled

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Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile." Mr. Justice Cardozo, with whom joined the present Chief Justice and Mr. Justice Brandeis, dissenting in *Jones v. Securities and Exchange Commission*, 298 U. S. 1, 32-33. See also Handler, Constitutionality of Investigations of the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 905, particularly at 933 ff.

On the other hand, the case for protected privacy was put by Mr. Justice Brandeis, dissenting, in *Olmstead v. United States*, 277 U. S. 438, 478-479: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive right and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth."

[31] *Wilson v. United States*, 221 U. S. 361, 382; *Hale v. Henkel*, 201 U. S. 43, 74-75; The Fourth and Fifth Amendments and the Visitorial Power of Congress over State Corporations, Note (1930) 30 Col. L. Rev. 103.

[32] *Ibid.*; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Interstate Commerce Commission v. Baird*, 194 U. S. 25; *Baltimore & Ohio R. R. v. Interstate Commerce Commission*, 221 U. S. 612; *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U. S. 194; *United States v. Louisville & N. R. R.*, 236 U. S. 318; *Smith v. Interstate Commerce Commission*, 245 U. S. 33; *United States v. New York Central R. R.*, 272 U. S. 457; cf., however, *Harriman v. Interstate Commerce Commission*, 211 U. S. 407; *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160. And see Handler, Constitutionality of Investigations by the Federal Trade Commission (1928) 28 Col. L. Rev. 708, 903.

The power is not limited to inquiring concerning matters which Congress may regulate otherwise than by requiring the production of information, at any rate when it is made to appear that some phase of the activity is in commerce or affects it. See *United States v. New York Central R. R.*, 272 U. S. 457, 464, and authorities cited; *Federal Trade Commission, v. Claire Furnace Co.*, 274 U. S. 160. Nor must the "jurisdictional" line be drawn in such cases before the information is called for. Cf. *Myers v. Bethlehem Corp.*, 303 U. S. 41; Handler, *op. cit. supra*, at 918 ff., and authorities cited.

that corporations are not entitled to all of the constitutional protections which private individuals have in these and related matters. As has been noted, they are not at all within the privilege against self-incrimination, although this Court more than once has said that the privilege runs very closely with the Fourth Amendment's search and seizure provisions.[33] It is also settled that an officer of the company cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it.[34] And, although the Fourth Amendment has been held applicable to corporations[35] notwithstanding their exclusion from the privilege against self-incrimination, the same leading case of *Wilson* v. *United States*, 221 U. S. 361, distinguishing the earlier quite different one of *Boyd* v. *United States*, 116 U. S. 616,[36] held the process not invalid under the Fourth Amendment, although it broadly required the production of copies of letters and telegrams "signed or purported to be signed by the President of said company during the month[s] of May and June, 1909; in regard to an alleged violation of the statutes of the United States by C. C. Wilson." 221 U. S. at 375.

The *Wilson* case has set the pattern of later decisions and has been followed without qualification of its ruling.[37] Contrary sug-

[33] In the leading case of Boyd *v.* United States, 116 U. S. 616, 630, Mr. Justice Bradley, speaking for the Court in relation to the compelled production of "a man's own testimony or of his private papers [specifically a business invoice] to be used as evidence to convict him of crime or to forfeit his goods," said in a much quoted statement: "In this regard the Fourth and Fifth Amendments run almost into each other." The opinion, quoting at length from Lord Camden's discussion in the historic case of Entick *v.* Carrington, 19 Howell's State Trials, 1029, relies strongly in this phase upon his conjunction of the right to freedom from search and seizure "where the law forceth evidence out of the owner's custody by process" and the privilege against self-incrimination. 116 U. S. at 629. Cf. also the statement of Mr. Justice Brandeis, quoted *supra* note 30.

[34] Wilson *v.* United States, 221 U. S. 361; Hale *v.* Henkel, 201 U. S. 43; Interstate Commerce Commission *v.* Baird, 194 U. S. 25.

[35] Silverthorne Lumber Co. *v.* United States, 251 U. S. 385; Hale *v.* Henkel, 201 U. S. 43; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 448 ff. See also Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541.

[36] See note 33. The ruling was limited, in view of the facts, to criminal proceedings and proceedings for forfeiture of property. Only a single document was called for. The vitiating element lay in the incriminating character of the unusual provision for enforcement. The statute provided that failure to produce might be taken as a confession of whatever might be alleged in the motion for production.

[37] See notes 31, 32, 40.

Thus far Congress has not seen fit to leave to administrative officials authority to enforce subpoenas. The pattern adopted in §§ 9 and 10 of the

gestions or implications may be explained as dicta;[38] or by virtue of the presence of an actual illegal search and seizure, the effects of which the Government sought later to overcome by applying the more liberal doctrine developed in relation to "constructive search";[39] or by the scope of the subpoena in calling for documents so broadly or indefinitely that it was thought to approach in this respect the character of a general warrant or writ of assistance, odious in both English and American history.[40] But no case has been cited or found in which, upon similar facts, the *Wilson* doctrine has not been followed. Nor in any has Congress

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Federal Trade Commission Act, of referring enforcement to the courts, has become accepted, whether by virtue of reflections of the opinion in Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, or for other reasons. The extent to which the pattern has been adopted is summarized, partially at least, in Handler, *op. cit. supra*, at 925 ff.

[38] See, for example, Essgee Co. *v.* United States, 262 U. S. 151.

[39] E. g., in Silverthorne Lumber Co. v. United States, 251 U. S. 385, government officers, after arresting corporate officials at their homes, "without a shadow of authority went to the office of their company and made a clean sweep of all the books, papers and documents found there," taking them to the district attorney's office, where they were photographed. After an order of court to return the originals, but impounding the copies, subpoenas to produce the originals were enforced by an order, the refusal to obey which was held a contempt. The Court's strong language in reversing this decision undoubtedly was called forth by the Government's effort, not to say subterfuge, thus to avoid the effects of its initial wrong. Cf. Weeks *v.* United States, 232 U. S. 383; Gouled *v.* United States, 255 U. S. 298.

[40] Thus, the aggravating circumstance in Federal Trade Commission *v.* American Tobacco Co., 264 U. S. 298, cf. note 27, seems to have been the Commission's claim of "an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of § 5." 264 U. S. at 305. The Court said: "It is contrary to the first principles of justice to allow a search through all the respondents' records, *relevant or irrelevant*, in the hope that something will turn up." P. 306. (Emphasis added.) Cf. Silverthorne Lumber Co. *v.* United States, *supra*, note 39.

However in Wheeler *v.* United States, 226 U. S. 478, where no element of actual search and seizure was present, a subpoena was enforced which called for copies of all letters and telegrams, all cash books, ledgers, journals and other account books of the corporation covering a period of fifteen months: cf. Interstate Commerce Commission *v.* Brimson, 154 U. S. 447. And in Brown *v.* United States, 276 U. S. 134, the subpoena called for all letters, telegrams or copies thereof passing between a national trade association and its members, including their officers and agents, over a period of two and one-half years, with reference to eighteen different items. The Court, by Mr. Justice Sutherland, said: "The subpoena . . . specifies a reasonable period of time and, with reasonable particularity, the subjects to which the documents called for relate. The question is ruled, not by Hale *v.* Henkel, but by Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541, 553-554, and Wheeler *v.* United States," *supra.*

With reference to the breadth of the subpoena or order for production in the scope of what is called for, in addition to the authorities cited in this note and note 45, see Hammond Packing Co. *v.* Arkansas, 212 U. S. 322, United States *v.* Bausch & Lomb Optical Co., 321 U. S. 107; Handler, *op. cit. supra*, at 913 ff.

been adjudged to have exceeded its authority, with the single exception of *Boyd* v. *United States, supra,* which differed from both the *Wilson* case and the present ones in providing a drastically incriminating method of enforcement[41] which was applied to the production of partners' business records. Whatever limits there may be to congressional power to provide for the production of corporate or other business records, therefore, they are not to be found, in view of the course of prior decisions, in any such absolute or universal immunity as petitioners seek.

Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

As this has taken form in the decisions, the following specific results have been worked out. It is not necessary, as in the case of a warrant, that a specific charge or complaint of violation of law be pending or that the order be made pursuant to one. It is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command. This has been ruled most often perhaps in relation to grand jury investigations,[42] but also frequently in respect to general or statistical investigations authorized by Congress.[43] The requirement of "probable cause, supported by oath or affirmation" literally applicable in the case of a warrant is satisfied, in that of an order for production, by the

[41] See note 36.

[42] E. g., Hale *v.* Henkel, 201 U. S. 43; Wilson *v.* United States, 221 U. S. 361, 372.

[43] Smith *v.* Interstate Commerce Commission, 245 U. S. 33; Baltimore & Ohio R. R. *v.* Interstate Commerce Commission, 221 U. S. 612; cf. Interstate Commerce Commission *v.* Goodrich Transit Co., 224 U. S. 194; Harriman *v.* Interstate Commerce Commission, 211 U. S. 407, 419. And see Handler, *op. cit. supra,* 918 ff.

court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry.[44] Beyond this the requirement of reasonableness, including particularity in "describing the place to be searched, and the persons or things to be seized," also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry. Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.[45]

When these principles are applied to the facts of the present cases, it is impossible to conceive how a violation of petitioners' rights could have been involved. Both were corporations. The only records or documents sought were corporate ones. No possible element of self-incrimination was therefore presented or in fact claimed. All the records sought were relevant to the authorized inquiry,[46] the purpose of which was to determine two issues, whether petitioners were subject to the Act and, if so, whether they were violating it. These were subjects of investigation authorized by § 11(a), the latter expressly, the former by necessary implication.[47] It is not to be doubted that Congress could authorize investigation of these matters. In all these respects,[48] the specifi-

[44] Cf. the authorities cited in notes 42 and 43.

[45] Cf. Go-Bart Importing Co. *v.* United States, 282 U. S. 344, 357; Boyd *v.* United States, 116 U. S. at 630, and note 40 *supra.*

[46] The subpoena in No. 61 called for production of:

"All of your books, papers and documents showing the hours worked by and wages paid to each of your employees between October 28, 1938, and the date hereof, including all payroll ledgers, time sheets, time cards and time clock records, and all your books, papers and documents showing the distribution of papers outside the State of Oklahoma, the dissemination of news outside the State of Oklahoma, the source and receipt of news from outside the State of Oklahoma, and the source and receipt of advertisements of nationally advertised goods."

The specification in No. 63 was substantially identical except for the period of time covered by the demand.

[47] See the language of the section, note 24 *supra.* Of course violation could be found only in situations where coverage would exist. Authority to investigate the existence of violations accordingly included authority to investigate coverage. Cf. Endicott Johnson Corp. *v.* Perkins, 317 U. S. 501; Myers *v.* Bethlehem Corp., 303 U. S. 41, discussed in the text herein at notes 49-51; and authorities cited in note 32 *supra.*

[48] The description was made with all of the particularity the nature of the inquiry and the Administrator's situation would permit. See note 46. The subpoenas were limited to the books, papers and documents of the respective

cations more than meet the requirements long established by many precedents.

More recent confirmation of those rulings may be found in *Endicott Johnson Corp.* v. *Perkins, supra,* and *Myers* v. *Bethlehem Corp.*, 303 U. S. 41. It is true that these cases involved different statutes substantially and procedurally. But, notwithstanding the possible influence of the doctrine of governmental immunity to suit in the *Endicott Johnson* case, it would be anomalous to hold that under the Walsh-Healy Act, 49 Stat. 2036, the District Court was not authorized to decide the question of coverage or, on the basis of its adverse decision, to deny enforcement to the Secretary's subpoena seeking relevant evidence on that question, because Congress had committed its initial determination to him; and at the same time to rule that Congress could not confer the same power upon the Administrator with reference to violations of the Fair Labor Standards Act.[49] The question at issue is not in either case the nature of the legal obligation violation of which the evidence is sought to show. It is rather whether evidence relevant to the violation, whatever the obligation's character, can be drawn forth by the exercise of the subpoena power.

The *Myers* case did not involve a *subpoena duces tecum*, but was a suit to enjoin the National Labor Relations Board from holding a hearing upon a complaint against an employer alleged to be engaged in unfair labor practices forbidden by the Wagner Act, 49 Stat. 449. The hearing required an investigation and determination of coverage, involving as in this case the question whether the company was engaged in commerce. It denied this upon allegations thought to sustain the denial, as well as the futility, expensiveness and vexatious character of the hearing to itself.[50] This Court held that the District Court was without

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corporations, to which alone they were addressed. They required production at specified times and places in the cities of publication and stated the purpose of the investigation to be one affecting the respondent, pursuant to the provisions of §§ 9 and 11(c), "regarding complaints of violations by said company of Sections 6, 7, 11(c), 15(a), 15(a)(2) and 15(a)(5) of the Act." Cf. the authorities cited in notes 32 and 45.

[49] This Court, in granting certiorari in the *Endicott Johnson* case, did so, among other reasons, "because of probable conflict with" General Tobacco & Grocery Co. *v.* Fleming, 125 F. 2d 596, a case arising under the Fair Labor Standards Act. 317 U. S. at 502.

[50] To the argument of "irreparable damage," the Court said:

"The contention is at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. . . .

jurisdiction to enjoin the hearing. Regarding as appropriate the procedure before the Board and as adequate the provisions for judicial review of its action, including its determination of coverage, the Court sustained the exclusive judisdiction of the Board, and of the Court of Appeals upon review, to determine that question, with others committed to their judgment, in the statutory proceeding for determining whether violations of the Act exist. The opinion referred to the Board's subpoena power, also to its authority to apply to a District Court for enforcement, and stated that "to such an application appropriate defense may be made." But the decision's necessary effect was to rule that it was not "an appropriate defense" that coverage had not been determined prior to the hearing or, it would seem necessarily to follow, prior to the Board's preliminary investigation of violation. If this is true in the case of the Board, it would seem to be equally true in that of the Administrator.[51]

In these results under the later as well as the earlier decisions the basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are not identical with those protected against invasion by actual search and seizure, nor are the threat-

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Obviously the rule . . . cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." 303 U. S. at 50.

[51] It is true that in the *Myers* situation the Board's determination is quasi-judicial, is given finality as to the facts if there is evidence to sustain its findings, National Labor Relations Act, § 10(e) (49 Stat. 454), and is expressly made exclusive, *ibid.*, § 10(a), whereas in the situations now presented the Administrator's investigation is only preliminary to instituting proceedings in court and thus has none of the finality or quasi-judicial character given to the Board's determination. But, as the Court noted, the Board also has preliminary investigative authority, incidental to preparation for the hearing, to which its subpoena power applies, National Labor Relations Act, § 11 (49 Stat. 455, 456); and, as we have said, if the courts are forbidden to determine coverage prior to the Board's quasi-judicial proceeding for deciding that question, it would seem necessarily to follow that they are forbidden also to decide it prior to the Board's preliminary investigation to determine whether the proceeding shall be instituted.

The mere fact that the first stage of formal adjudication is administrative in the one case and judicial in the other would seem to make no difference with the power of Congress to authorize either the preliminary investigation or the use of the subpoena power in aid of it.

ened abuses the same. They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examination can be expensive, so much so that it eats up men's substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason.

On the other hand, petitioners' view if accepted would stop much if not all of investigation in the public interest at the threshold of inquiry and, in the case of the Administrator, is designed avowedly to do so. This would render substantially impossible his effective discharge of the duties of investigation and enforcement which Congress has placed upon him. And if his functions could be thus blocked, so might many others of equal importance.

We think, therefore, that the Courts of Appeals were correct in the view that Congress has authorized the Administrator, rather than the District Courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations; in doing so to exercise his subpoena power for securing evidence upon that question, by seeking the production of petitioners' relevant books, records and papers; and, in case of refusal to obey his subpoena, issued according to the statute's authorization, to have the aid of the District Court in enforcing it. No constitutional provision forbids Congress to do this. On the contrary, its authority would seem clearly to be comprehended in the "necessary and proper" clause, as incidental to both its general legislative and its investigative powers.

IV.

What has been said disposes of petitioners' principal contention upon the sufficiency of the showing. Other assignments, however, present the further questions whether any showing is required beyond the Administrator's allegations of coverage and relevance of the required materials to that question; and, if so, of what character. Stated otherwise they are whether the court may order enforcement only upon a finding of "probable cause," that is, probability in fact, of coverage, as was held by the Court of Appeals for the Tenth Circuit in No. 61; following the lead of the

Eighth Circuit in *Walling* v. *Benson*, 137 F. 2d 501, or may do so upon the narrower basis accepted by the Third Circuit in No. 63.

The showing in No. 61 was clearly sufficient to constitute "probable cause" in this sense under conceptions of coverage prevailing at the time of the hearing,[52] whether or not that showing was necessary. Accordingly the judgment in that case must be affirmed.

In No. 63 the showing was less extensive, and it is doubtful that it would constitute "probable cause" of coverage as that term was used in the decisions from the Tenth and Eighth Circuits.[53] The Court of Appeals for the Third Circuit did not so label it, but held the showing sufficient.

Congress has made no requirement in terms of any showing of "probable cause";[54] and, in view of what has already been said, any possible constitutional requirement of that sort was satisfied by the Administrator's showing in this case, including not only the allegations concerning coverage, but also that he was proceeding with his investigation in accordance with the mandate of Congress and that the records sought were relevant to that purpose. Actually, in view of today's ruling in *Mabee* v. *White Plains Pub.*

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[52] The evidence that the company or its employees were engaged in commerce, etc., was supplied largely by it in the return to the rule to show cause and the supporting affidavits, consisting of admissions and statements of fact concerning its modes of doing business. The admissions obviously were made upon petitioner's broad theory that the publishing business is not subject to the Act or to the commerce power. But those conclusions do not nullify the factual character of the admissions and, so taken, they adequately sustain the appellate court's conclusion of "probable cause" of coverage.

[53] See notes 3, 4. The Administrator's allegations, more general than in No. 61, merely set forth that the company was a newspaper publisher, that the Administrator had reason to believe it was violating the Act, and that it was "engaged in commerce and in the production of goods for commerce." This conclusion was denied. The admissions of the return, including the affidavits, supplied only the pertinent facts in relation to coverage that the respondent, News Printing Co., was engaged in the business of publishing and distributing the "Paterson Evening News," a daily paper, that less than one per cent of its circulation of more than 23,000 copies, or a daily average of 278 copies, was distributed outside New Jersey, where the paper was published, and that the business was conducted in the same manner as other "local" papers according to the methods shown by the affidavits. These disclosed nothing material concerning interstate phases of such businesses generally, except as might be inferred from statements that they publish national and international as well as local news, and must do so as quickly as possible after the events occur.

[54] Section 9 of the Federal Trade Commission Act authorizes the Administrator to invoke the aid of the court "in case of disobedience of the subpoena" and the court is authorized to give assistance "in case of contumacy or refusal to obey a subpoena issued to any corporation or other person." Cf. note 24.

Co., supra, the showing here, including the fact supplied by the response, was sufficient to establish coverage itself, though that was not required.

The result therefore sustains the Administrator's position that his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence,[55] and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be "limited . . . by forecasts of the probable result of the investigation . . ." *Blair* v. *United States*, 250 U. S. 273, 282; cf. *Hale* v. *Henkel*, 201 U. S. 43. Nor is the judicial function either abused or abased, as has been suggested,[56] by leaving to it the determination of the important questions which the Administrator's position concedes the courts may decide.[57]

Petitioners stress that enforcement will subject them to inconvenience, expense and harassment. That argument is answered fully by what was said in *Myers* v. *Bethlehem Corp.*[58] There is

[55] The bill of discovery in equity would seem to furnish an instance. Cf. Sinclair Refining Co. v. Jenkins Petroleum Co., 289 U. S. 689, 696-697. See also the provisions for pretrial examination and the taking of depositions, Federal Rules of Civil Procedure, Rules 26(b), 30(d), 45; Union Central Life Ins. Co. v. Burger, 27 F. Supp. 556; Bloomer v. Sirian Lamp Co., 8 F. R. S. 26b.31, Case 3; Lewis v. United Air Lines Transport Corp., 27 F. Supp. 946, 947. The power of Congress itself to call for information presents a related illustration. McGrain v. Daugherty, 273 U. S. 135, 156-158.

[56] In General Tobacco & Grocery Co. v. Fleming, 125 F. 2d 596, 599, the court said: "In the exercise of the judicial power to review questions of law, as conferred by an Act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency." In this case, No. 63, the District Court said: ". . . the functions of the courts remain, and those functions are not merely to act as an adjunct of administrative bodies. . . ." 49 F. Supp. 659, 661.

[57] The issues of authority to conduct the investigation, relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters. Nor would there be any failure to satisfy fully the discretionary power implied in the statute's use of the word "may," rather than "shall," see note 24, in authorizing the court to enforce the subpoenas. It would be going far to say that Congress could not proceed upon this basis, but could go forward only by requiring a showing of probable cause of coverage in the sense of probability in fact of coverage. Cf. note 44 and text. Coverage is but one element in violation and if probable cause, in that sense, must be shown concerning it, it is difficult to understand why probable cause must not be shown also concerning exemptions, see Martin Typewriter Co. v. Walling, 135 F. 2d 918; Walling v. LaBelle S. S. Co., 148 F. 2d 198, or any other essential element in violation.

[58] See note 50 *supra*.

no harassment when the subpoena is issued and enforced according to law. The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision. Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable or overreaches the authority Congress has given. To it they may make "appropriate defense" surrounded by every safeguard of judicial restraint. In view of these safeguards, the expressed fears of unwarranted intrusions upon personal liberty are effective only to recall Mr. Justice Cardozo's reply to the same exaggerated forebodings in *Jones* v. *Securities and Exchange Commission*: "Historians may find hyperbole in the sanguinary simile."[59]

Nor is there room for intimation that the Administrator has proceeded in these cases in any manner contrary to petitioners' fundamental rights or otherwise than strictly according to law. It is to be remembered that petitioners' are not the only rights which may be involved or threatened with possible infringement. Their employees' rights and the public interest under the declared policy of Congress also would be affected if petitioners should enjoy the practically complete immunity they seek.

No sufficient reason was set forth in the returns or the accompanying affidavits for not enforcing the subpoenas, a burden petitioners were required to assume in order to make "appropriate defense."

Accordingly the judgments in both causes, No. 61 and No. 63, are

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

[59] See note 30.

SUPREME COURT OF THE UNITED STATES.

Nos. 61, 63.—October Term, 1945.

Oklahoma Press Publishing Company, Petitioner, 61 *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.
News Printing Co., Inc., Petitioner, 63 *vs.* L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[February 11, 1946.]

Mr. Justice Murphy, dissenting.

It is not without difficulty that I dissent from a procedure the constitutionality of which has been established for many years. But I am unable to approve the use of non-judicial subpoenas issued by administrative agents.

Administrative law has increased greatly in the past few years and seems destined to be augmented even further in the future. But attending this growth should be a new and broader sense of responsibility on the part of administrative agencies and officials. Excessive use or abuse of authority can not only destroy man's instinct for liberty but will eventually undo the administrative processes themselves. Our history is not without a precedent of a successful revolt against a ruler who "sent hither swarms of officers to harass our people."

Perhaps we are too far removed from the experences of the past to appreciate fully the consequences that may result from an irresponsible though well-meaning use of the subpoena power. To allow a non-judicial officer, unarmed with judicial process, to demand the books and papers of an individual is an open invitation to abuse of that power. It is no answer that the individual may refuse to produce the material demanded. Many persons

have yielded solely because of the air of authority with which the demand is made, a demand that cannot be enforced without subsequent judicial aid. Many invasions of private rights thus occur without the restraining hand of the judiciary ever intervening.

Only by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty. Statutory enforcement would not thereby be made impossible. Indeed, it would be made easier. A people's desire to cooperate with the enforcement of a statute is in direct proportion to the respect for individual rights shown in the enforcement process. Liberty is too priceless to be forfeited through the zeal of an administrative agent.